Supreme Court, U.S.
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No. 96-1809

In The
Supreme Court of the United States

October Term, 1996

SCOT A. REINERT,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Suppression Court rule correctly in denying the petitioner's request to suppress evidence seized by law enforcement officers from the defendant's home during a warrantless search, where the initial entry into the home was made on the basis of exigent circumstances, items seized were observed in plain view, and the items would have been admissible under an inevitable discovery rule?

2. Did the Suppression Court rule correctly in denying the petitioner's motion to suppress statements made by the defendant on March 10, 1991, which occurred after the defendant was provided with his *Miranda* rights on two occasions, and his waiver of rights was knowing, intelligent and voluntary?

3. Was petitioner denied his Fifth and Sixth Amendment rights to effective assistance of trial counsel where supposed expert witnesses who would testify to the petitioner's physical and mental condition regarding his waiver of *Miranda* rights and the effects of Prozac did not exist at the time of trial, where trial counsel correctly refrained from having petitioner testify at a suppression hearing where such testimony could have been used to impeach petitioner at trial, and where counsel's testimony regarding petitioner's condition at the time he gave his statement would have been cumulative of other witnesses who testified to the same information?

4. Did the Trial Court rule correctly in precluding the introduction of any lay testimony concerning the victim's use of Prozac where there was an insufficient foundation to allow the introduction of such testimony in relation to the victim's conduct, and where such use of Prozac did not bear upon the defendant's culpability?

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COUNTER-STATEMENT OF THE CASE

On March 10, 1991, officers of the Allentown Police Department were called to the blood-stained row home where Scot Reinert stabbed his former lover to death. Officers observed blood streaked on walls and puddling on floors throughout the house. Reinert would subsequently inform police that he plunged a large butcher knife into Sean Brady's upper torso six times and to a depth of seven inches. (N.T. Vol. IV, 16-26)[1] Four of the wounds were fatal. (N.T. Vol. IV, 24) The wounds inflicted on the victim's body were consistent with the size and dimension of the blade of the knife seen in plain view in the second floor bathroom by police officers as they inspected the home for other victims and to preserve essential evidence. (N.T. Vol. IV, 28) Officer Jeffrey Mertz of the Allentown Police Department responded to 120 N. West St. in Allentown, Lehigh County, Pennsylvania, upon a call to assist an ambulance with a person who slashed his wrists and the report of a body in the house. (N.T. Vol. I, 23-24) Upon Officer Mertz' arrival at the residence at 12:11 p.m., he was directed inside the home and to the third floor by the defendant's step-father. (N.T. Vol. I, 25) As Officer Mertz entered the home, he noticed the defendant seated on the living room floor with what appeared to be dried blood on each of his wrists. (N.T. Vol. I, 26) Officer Mertz did not see the defendant's mother in the house as he entered, but did later learn she was in the house. (N.T. Vol. I, 27-28)

Upon Officer Mertz' arrival on the third floor, he discovered a body wrapped in bedsheets with only the legs exposed. (N.T. Vol. I, 27) This body was later identified as that of Sean Brady. (N.T. Vol. I, 34) Officer Mertz remained on the third floor until the body was removed from the house. (N.T. Vol. I, 34)

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[1] "N.T." refers to trial notes of testimony, January 17-30, 1992. "S.N.T." refers to notes of testimony from the Suppression Hearing, held August 20-21, 1991.

Soon after police officers arrived at the house, they were followed by members of the Allentown Emergency Medical Services Squad. EMS Technician Timothy Snyder entered the home and initiated treatment of the defendant. (N.T. Vol. I, 53) During the time of his treatment, the defendant was awake and his wounds were not actively bleeding. (N.T. Vol. I, 53) Mr. Snyder did a routine evaluation of the defendant which consisted of asking him if he knew where he was, what was going on, and what had happened. Based upon the defendant's responses to these questions, Snyder judged him to be mentally coherent at the time. (N.T. Vol. I, 54) In fact, on each of four criteria, Snyder found the defendant possessed the highest level of coherence and mental clarity possible. (N.T. Vol. I, 56-58) The defendant was eventually removed from the house and taken to an ambulance waiting outside. While treating Reinert in the ambulance, Snyder discovered an open abdominal wound on the defendant. When he asked the defendant what had happened, Reinert responded, "I stabbed him with a butcher knife, then I did myself." (N.T. Vol. I, 62) Although the defendant was wearing an oxygen mask to assist in his treatment at the time, EMS Snyder did not have any difficulty in understanding the defendant, nor were Reinert's words slurred or garbled. (N.T. Vol. I, 63)

Upon hearing the defendant's initial admission to the stabbing, EMS Technician Snyder alerted Officer Zimmerman of the Allentown Police Department that he may want to step into the ambulance. Importantly though, Snyder did not tell Zimmerman what Reinert had just said. (N.T. Vol. I, 62-63) Officer Zimmerman, who was accompanied by Officer Robert Lembach, asked the defendant a series of questions which included his name, his date of birth and what happened. At this time, the defendant was not in custody nor was he a suspect in a crime. The police officers had the limited knowledge that a body was found inside the house and that Reinert appeared to be wounded. Reinert was able to tell Officer Zimmerman his

name, his age and his home telephone number. (N.T. Vol. I, 143) When Zimmerman, without knowledge of Reinert's previous statement to EMS Technician Snyder, asked the defendant what had happened, Reinert replied, "I stabbed him. I think I killed him." (N.T. Vol. I, 143)

Following this response, Officer Zimmerman immediately stopped the defendant from saying anything else. Zimmerman took out a *Miranda* card and advised the defendant of his rights. (N.T. Vol. I, 143) When Zimmerman advised the defendant of his *Miranda* rights, the defendant stated that he understood his rights. When Zimmerman asked the defendant if he was willing to speak with him at this time, Reinert responded affirmatively. (N.T. Vol. I, 144) Zimmerman then asked whom Reinert stabbed, and the defendant answered, "Sean. Sean Brady." The defendant identified the victim as the corpse found within the house. Zimmerman asked how the killing was committed and Reinert informed him, "With a butcher knife." (N.T. Vol. I, 145) Despite the use of an oxygen mask by the defendant, Officer Zimmerman testified he did not have any difficulty in understanding what the defendant said. (N.T. Vol. I, 145)

Before the arrival of Detectives Stauffer and Granitz at the home at approximately 12:45 p.m., the police had not conducted a thorough inspection of the residence. Officer Mertz went immediately to the third floor to verify the location of the body. (N.T. Vol. I, 37) Officer Lembach never proceeded past the second floor (N.T. Vol. I, 31) and Officer Zimmerman only glanced in rooms on the second floor as he went up to the third floor to confer with Officer Mertz. (N.T. Vol. I, 157) Although a thorough search of the home was a high priority, the detectives were also faced with the need to expedite a determination by the coroner of the time of death of Brady. Such an investigation required an alteration of the condition of the corpse. This entailed the coroner performing an incision to conduct a liver probe to obtain a body temperature. (N.T. Vol. I, 139; Vol. IV,

28) The victim was wrapped in blankets that obscured the nature of any injuries to his body. When Sgt. Thomas Moyer arrived at 1:00 p.m., he took photographs of the scene on the third floor bedroom where the victim's body was located to preserve a depiction of the crime scene as the victim's body was found. Following this procedure, Moyer joined Stauffer for a brief protective serach, during which the murder weapon was observed in plain view on the floor of the second floor bathroom. (S.N.T. 8/20/91, 28) Contrary to petitioner's assertions, the police did not conduct a five-hour photographic or video tape memorialization of the interior of the defendant and victim's house. Instead, Sgt. Moyer completed his photographic duties within two hours from his arrival. (N.T. S.N.T., 8/20/91, 182)

At the time when the officers entered the home, the defendant's mother and step-father were present. Det. Granitz received information from the defendant's mother, Janet Ketner, which was confusing and contradictory. (S.N.T. 8/20/91, 186) Mrs. Ketner testified that when she called her son at approximately 11:30 A.M. on March 10, 1991, he mentioned something about a body. When questioned further about this statement, Mrs. Ketner related the defendant said, "One time there was a body, and I looked again and there wasn't a body, so I guess there never really was a body." (S.N.T. 8/21/91, 28) When Mrs. Ketner asked the defendant about his roommate, Sean Brady, Reinert responded, "I think some of his friends are in town, and I think he went out with them for the day." (S.N.T. 8/21/91, 28) When she arrived at the house, Mrs. Ketner went straight to the third floor and did not go through every room. (S.N.T. 8/21/91, 40) Mrs. Ketner informed the police what her son told her about a body being in the house and then disappearing, and that she found one body. However, she never informed the police she made anything resembling a thorough inspection of the home. (S.N.T. 8/21/91, 41)

As a result of this contradictory information, the police undertook a search of the entire house to determine if there was anyone else present who may have been injured or killed, or who may endanger the preservation of any evidence. As Det. Stauffer and Sgt. Moyer went through the house, Sgt. Moyer observed a butcher knife laying on the floor in the bathroom of the second floor. (S.N.T. 8/20/91, 128) This walk-through by Stauffer and Moyer commenced at approximately 1:30 p.m. and took twelve to sixteen minutes. (N.T. Vol. II, 68-69) Sgt. Moyer observed through an open doorway what appeared to be a butcher knife laying on the top of a weight scale in the corner of the bathroom. (S.N.T. 8/20/91, 179) Moyer and Stauffer were going through the house at the time to "try to determine if there were in fact any other people in the house and we did not find anyone." (S.N.T. 8/20/91, 128) The knife was not covered or in any cabinet, but was laying out in the open and in plain view. (S.N.T. 8/20/91, 129)

After the discovery of the knife, Detectives Stauffer and Granitz began the acquisition of various items of blood-stained evidence, all of which were out in the open in plain view. Although some drawers and closets were opened, the police did not obtain <u>any</u> item on March 10, 1991 which was taken from any closed container or a closed drawer. (S.N.T. 8/21/91, 25) Some items were removed from an open medicine chest, an open closet, and a garbage can which did not have a lid. All items that were taken from those specific locations were in plain view at the time of their observation. (S.N.T. 8/21/91, 25)

The defendant was transported from the residence at 120 N. West Street to the Lehigh Valley Hospital Center where he underwent surgery for the wounds upon his wrists and his abdomen. The emergency room nurse, Thomas Gavigan, was requested by Officer Zimmerman to note any statements the defendant made prior to surgery. (S.N.T. 8/20/91, 78) Within his notes, Nurse Gavigan wrote that Mr. Reinert said he was "fighting with his friend with a knife, they had fallen off the bed

and that he, the friend, might have done this." Reinert also stated he might have done this to himself. Reinert concluded by claiming that he had fallen down several stairs. (S.N.T. 8/20/91, 79) Nurse Gavigan believed Mr. Reinert was coherent at the time when he made these statements. Gavigan also testified that Reinert was not given any medication which would have affected his mental clarity. (S.N.T. 8/20/91, 80) The defendant's wounds were not actively bleeding at the time of treatment in the emergency room. (S.N.T. 8/20/91, 85) The defendant was able to provide information about the date of his last tetanus shot, that he was not on any medication, and that he lacked any significant prior medical history. (S.N.T. 8/20/91, 100) Once again, contrary to the petitioner's assertions, Nurse Gavigan was not instructed by Officer Zimmerman to write down any information with the specific purpose of providing the officer with a record of statements uttered by Reinert. Instead, Gavigan was asked to merely note any statements made by Reinert for subsequent review. (S.N.T. 8/20/91, 78)

Emergency Room Nurse Patricia Lombardo conducted an evaluation of Reinert to determine the necessity of 24-hour nursing observation. In the course of her questions, Lombardo asked Reinert if he intended to harm himself. Reinert responded by indicating that some of the wounds he sustained were self-inflicted. (S.N.T. 8/20/91, 98) Lombardo noted that Reinert's blood pressure was stable and that his pulse was satisfactory. (S.N.T. 8/20/91, 101) In addition, Nurse Lombardo calculated the level of consciousness exhibited by Reinert based upon a scale described in a procedure called the Glasgow Coma Test. The patient's level of consciousness is recorded on a number of different scales and then totaled to calculate a score indicating a level of consciousness during treatment. (S.N.T. 8/20/21, 101-102) Based upon the fact that Reinert's eyes opened spontaneously, his verbal responses were oriented to time, place, person and situation, he was able to follow directions, he obeyed commands, and was able to inform the nurse of his medical injuries, Reinert received the highest possible score on the

Glasgow Coma Test. This meant his level of consciousness was alert and oriented. (S.N.T. 8/20/91, 105) This evaluation was made at 12:42 p.m., approximately 31 minutes after the time of the original police call. (S.N.T. 8/20/91, 107) Based upon all these factors, Nurse Lombardo held the opinion that Reinert was alert and coherent during the entire time of the evaluation by the nurses. (S.N.T. 8/20/91, 109)

Upon Mr. Reinert's arrival in the operating room, he was judged to be in very stable condition. (N.T. Vol. III, 13) His injuries were classified as "minor wounds" by one doctor. (N.T. Vol. III, 14) During the course of the operation, Mr. Reinert lost less than one-half pint of blood (N.T. Vol. III, 16), and received his last intravenous medication at 1:30 p.m. (N.T. Vol. III, 17) Reinert was administered a very mild anesthetic of the type that would be given to an out-patient with the thought of having the patient well enough to go home later that same day. (N.T. Vol. III, 34) Prior to surgery, the defendant was able to tell the anesthetist that he was alergic to penicillin, codeine and sulphur. (N.T. Vol. III, 25)

Following surgery, the defendant was under the supervision of Dr. Homeiu Hashemi, who participated in the surgery upon the defendant's abdomen wound. Dr. Hashemi's review of the records indicated that there were no sedatives administered to the defendant immediately following surgery. (N.T. Vol. IV, 142) At 7:30 p.m. on March 10, 1991, Dr. Hashemi checked the defendant and found that he was awake, that his vital signs were stable, and that he was stable post-operatively. (N.T. Vol. IV, 143) Following the surgical procedure, the only medications that defendant received were an antibiotic, an antacid, and one dosage of morphine at 10:00 o'clock p.m. (N.T. Vol. IV, 147)

At approximately 7:47 p.m. on March 10, 1991, Detectives Stauffer and Granitz arrived at the Lehigh Valley Hospital Center. After conferring with Dr. Hashemi, they were

told they could speak with the defendant. (N.T. Vol. II, 106) The detectives asked the defendant a few preliminary questions to determine if Reinert was conscious and oriented. (S.N.T. 8/20/91, 136) The defendant was able to answer questions about his name, his social security number, and his date of birth. The defendant was also advised of his *Miranda* rights a second time and indicated to the detectives that he understood his rights. Reinert agreed to waive his rights and speak with the detectives. (S.N.T. 8/20/91, 136-137) At this time, the defendant gave his statement to both detectives that he lived at the residence on N. West Street with Sean Brady. The previous Friday evening, they were coming back from New York City and got into an argument over Brady's plan to leave Reinert and move to Brooklyn. Shortly after they returned, Brady went up to the third floor bedroom. The defendant stayed downstairs, but at some point, he obtained a butcher knife from the kitchen. Reinert's original plan was to cut his wrists, but instead, he went upstairs and found Brady alone in bed in the third floor. The defendant related as he leaned over the victim, Brady opened his eyes and the defendant stabbed him. There was a struggle because Brady "wouldn't let me stab him." The defendant was not sure how many times he stabbed Brady, but it was more than once. (S.N.T. 8/20/91, 138; N.T. Vol. II, 111-112) Reinert told police the knife he used in the stabbing could be found in the bathroom on the second floor of the house. (N.T. Vol. II, 112) When asked why he stabbed Brady, Reinert admitted he was mad about Brady's proposed move out of Allentown. (N.T. Vol. IV, 114)

Following the stabbing, Reinert attempted suicide by slashing his wrists, stabbing himself in the stomach and by overdosing on sleeping pills he bought from a CVS drugstore on March 9, 1991. (N.T. Vol. IV, 115) Reinert was able to recall for the detectives he cut himself before stabbing his former lover and then attempted to slash his wrists with razor blades. (N.T. Vol. IV, 115-116) At no time during the conversation with the detectives did the defendant become incoherent, nor did his

answers seem to be illogical responses to any of the questions posed to him. (S.N.T. 8/20/91, 139-140) The entire conversation lasted approximately 45 minutes. (S.N.T. 8/20/91, 142)

SUMMARY OF REASONS FOR DENYING THE WRIT

"It is well-established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Those circumstances include situations, "where the initial intrusion that brings the police within plain view of such [evidence] is supported...by one of the recognized exceptions to the warrant requirement," such as the exigent circumstances intrusion. *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). In this particular case, police entered the defendant's home upon the report of a dead body and another person with severe injuries. In the course of doing a protective search to shield the officers and other persons from any assailant within the home or to prevent the destruction of evidence, members of the Allentown Police Department observed the murder weapon in plain view through an open doorway during a 12 to 16-minute cursory search of the home. Even if this Court should find that the items taken by the police were not observed in plain view by officers who had a valid reason for being in a particular location to observe the items, such evidence is sufficiently purged of any taint from unlawful police activity due to the inevitable discovery of the same items. The statement provided by the defendant to the detectives later that same day in the hospital serves as an independent basis for the police to obtain a warrant in which the same items seized by the police would have eventually been taken into custody through the execution of a search warrant. To prohibit the introduction of such items of evidence would add nothing to either the integrity or the fairness of a criminal trial. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

Statements were obtained from the defendant by medical personnel in the ambulance and also at the hospital emergency room. At the time these inculpatory statements were given, the defendant was not in police custody, the defendant was in stable medical condition and was alert and oriented to his surroundings. Any statements provided to the police were preceded by the administration of *Miranda* warnings which the defendant indicated he understood and waived. The defendant never displayed any delusional or halucinatory symptoms which would mitigate against a finding that the waiver of the *Miranda* warnings was anything other than a voluntary, intelligent and knowing decision.

The defendant has cited four basic allegations of ineffectiveness against trial counsel. Trial counsel cannot be held to be ineffective for failure to obtain expert witnesses to testify on matters for which there was no reasonable, scientific basis for their opinion, or if such witnesses did not exist. Affidavits which have been submitted some six years after the fact cannot be considered in any evaluation of trial counsel's effectiveness due to the inability of petitioner to legitimately claim these witnesses were available at the time of trial. The other allegations of ineffectiveness regarding trial counsel's failure to testify regarding the petitioner's condition when he gave his statement to the police and trial counsel's failure to advise the defendant to testify at a suppression hearing, are not the type of omission that would have affected the outcome of the trial.

Lastly, the Trial Court was correct in precluding any introduction of lay testimony concerning the victim's use of the drug Prozac based upon the insufficient foundation for such testimony and the lack of relation between the victim's use of Prozac and the petitioner's contention of self-defense. Neither the allegations of ineffectiveness nor the preclusion of testimony about Prozac were based on federal constitutional claims in the lower courts.

ARGUMENT FOR DENYING THE PETITION

A. The lower court ruled correctly in denying the petitioner's request to suppress evidence seized by law enforcement officers from the defendant's home during a warrantless search where the initial entry into the home was made on the basis of exigent circumstances, items seized were observed in plain view, and the items would have been admissible under an inevitable discovery rule.

When the police come upon the scene of a homicide, they may make a prompt, warrantless search of the area to see if there are other victims or if a killer is still on the premises. Furthermore, the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Wayne v. United States*, 115 U.S. app. D.C. 234, 241, 318 F.2d 205, 212 (1963) as quoted in *Mincey v. Arizona, supra*, 437 U.S. at 393, 98 S.Ct. at 2413. In addition, unlawfully obtained evidence is nevertheless admissible if it can be established that ultimately or inevitably the same evidence would have been discovered by lawful means. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 2037, 29 L.Ed.2d 564 (1971) Those circumstances include situations, "where the initial intrusion that brings the police within plain view of such [evidence] is supported...by one of the recognized exceptions to the warrant requirement," such as the exigent circumstances intrusion. *Arizona v. Hicks*, 480 U.S. 321,

107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). Contrary to the petitioner's assertions, there was never any extensive protective search conducted of the entire house before Det. Stauffer began going through the home with Sgt. Thomas Moyer. Contrary to petitioner's allegations within the Petition for Writ of Certiorari, there cannot be found any reference in any portion of the testimony that Officer Mertz looked in rooms on the second floor, including a bathroom, a middle room and Mr. Reinert's bedroom. Instead, Officer Mertz testified that he went only to the third floor. Officer Zimmerman, who arrived after Mertz, testified that he did not search any rooms as he proceeded up to the third floor to speak with Mertz. When Zimmerman returned downstairs, the Allentown EMS Squad, Officer Robert Lembach and Officer Bryan Brader had arrived on the scene. Lembach went to the back door and stationed Brader there. Lembach then went up to the second floor stairway where he spoke with Mertz. However, Lembach did not go into any rooms on the second floor and did not ever go up toward the third floor. (N.T. Vol. I, 131) As a result, the testimony indicates that not a single officer entered any of the rooms on the second floor before Stauffer and Moyer. Following the memorialization of the condition of the victim's body and its location, Moyer and Stauffer commenced their protective search. (N.T. Vol. II; 68-69) It was during this 12 to 16-minute protective search that Moyer discovered the butcher knife in plain view in the second floor bathroom. (S.N.T. 8/20/91, 179) The knife was not covered or in a cabinet, but was laying out in the open and in plain view. (S.N.T. 8/20/91, 129)

The Pennsylvania Superior Court wrote in its Opinion that the judge who presided over the Suppression Hearing and trial, the Honorable Carol K. McGinley, comprehensively discussed and adequately disposed of questions presented regarding the suppression of evidence and statements. Judge McGinley found that the police officers were lawfully on the scene when the evidence was observed in plain view. The knife was discovered unintentionally. The Pennsylvania Supreme

Court affirmed the reasoning and analysis of the Superior Court and Judge McGinley by denying the petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Contrary to the petitioner's assertion, the police did not conduct an initial protective sweep of the home before the detectives and Sgt. Moyer arrived. Instead, because the coroner needed to make a deep liver probe insertion into the body to determine the length of time the victim was dead, the initial protective search did not commence until the coroner's procedure was concluded. This procedure required the victim's body to be unwrapped from the bedsheet surrounding the body at the time. Because of the concern to accurately assess the length of time the victim was dead, it was necessary to make a photographic record of the victim's position and condition before he was moved and his original position altered. After this procedure was completed, Stauffer and Moyer then conducted their protective search of the home during which time the butcher knife was found in plain view in the bathroom.

All items which the police seized from the house were out in the open or in plain view. These included numerous items from the victim's bedroom, clothing, towels, a robe, switchplate covers, clothing from the bathroom on the second floor, and items which could be viewed from the hallway or which were located in the bedroom which the defendant was using at the time on the second floor. Some items also came from the kitchen and the first floor living room. (S.N.T. 8/21/91, 22) Det. Granitz testified under questioning from the Court during the Suppression Hearing that there were several items, "which were found in open containers, such as the medicine chest and the closet which were open." (S.N.T. 8/21/91, 25) A note taken from a garbage can was observed because the can did not have a lid upon it. The garbage can in the kitchen was not searched until a search warrant was obtained at a later time. (S.N.T. 8/21/91, 25-26)

Although the petitioner expresses great outrage that a magazine with a title upon it referring to homosexuals was taken into custody, Det. Granitz explained at the Suppression Hearing that the magazine was seen when the mattress of the victim's bed was lifted to enable the police to remove blood-stained sheeting. The sheeting was in plain view and blood-stained to such an extent to make it an obvious item of material evidence. When the mattress was lifted to remove the sheets, the magazine was observed. (S.N.T. 8/21/91, 24) More importantly though, the magazine was never introduced at trial. Therefore, the defendant did not suffer any prejudice from this particular item being retrieved by the police.

Petitioner argues that the decisions by the United States Supreme Court in *Mincey v. Arizona*, *supra*, and *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984) should prompt a reversal of the decision by the Suppression Court, the Superior Court and the Supreme Court of Pennsylvania. However, upon closer examination, there are sufficient factors which distinguish the case before the Court from those previously decided by the United States Supreme Court. As the Suppression Court correctly noted, the search in *Mincey* involved the warrantless examination of a premises over a four-day period and involved a full-scale search and seizure. In *Thompson*, police were called to the house on the basis of an emergency, but then proceeded to look within closed drawers in a dresser to obtain items to be used in an investigation. The Superior Court referred to the Suppression Court Opinion authored by Judge McGinley in which she found that "all items seized by the police were in plain view." Under the test established in *Arizona v. Hicks*, *supra*, the police must lawfully be in a position to view the evidence, the discovery of the evidence must be inadvertent, and the evidence must be suspected contraband. If an article is already in plain view, neither its observation nor its seizure would involve an invasion of privacy. *Hicks*, 480 U.S. at 325, 107 S.Ct. at 1152. In this case, the police were lawfully on the scene and justified in

searching every room at the scene of a homicide to determine the existence of any other victims or persons who might be injured, endanger the police, or destroy evidence. Since the *Hicks* decision, the United States Supreme Court eliminated the inadvertence requirement in *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Upon review, the police officers' actions can be seen to be consistent with an entry into the home based upon exigent circumstances, and the recovery of the murder weapon was the result of a plain view observation by police officers who were lawfully in a position to view the evidence which was suspected contraband.

If, for any reason, this Honorable Court should believe the items seized by the police on March 10, 1991, were not within the plain view exception to the requirement for a search warrant, or that the items were not seized while under exigent circumstances, the respondent/Commonwealth of Pennsylvania would offer that these items would have been inevitably discovered based upon evidence independently obtained by the police. Following the time when the police concluded their search of the house and secured the residence on March 10, 1991, Det. Stauffer and Det. Granitz went to the Lehigh Valley Hospital Center to speak with Reinert. Reinert told the police that he went into the kitchen and obtained a butcher knife which he took upstairs. He also indicated to the police that the knife he used in the stabbing was in the bathroom on the second floor. (S.N.T. 8/20/91, 168; N.T. Vol. II, 111) It was during this conversation, that Reinert related he left the house after stabbing Sean Brady and went to a CVS drugstore in Allentown where he purchased sleeping pills. (S.N.T. 8/20/91, 190; N.T. Vol. II, 115) Based upon the information that was received from Reinert during this conversation, the police returned to the residence on March 12, 1991, with a search warrant to look for evidence referring to Reinert's purchase of sleeping pills and his trip to the drugstore. The police returned on March 20, 1991, with a search warrant to look for the victim's diary in the house.

Even if the police did not observe the knife in the bathroom while conducting the protective search, the defendant's statement gave the police the location of the knife Reinert used to kill the victim. Reinert's statement regarding the location of the knife would have independently provided the police with the basis for being able to obtain a search warrant to return to the home which was still in police custody. See *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3388, 82 L.Ed.2d 599 (1984) and *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). The police did so on at least two occasions subsequent to March 10, 1991. The United States Supreme Court has stated that the exclusion of physical evidence that would have been inevitably discovered adds nothing to either the integrity or fairness of a criminal trial. *Nix v. Williams, supra*, 417 U.S. at 446, 104 S.Ct. at 2510, 81 L.Ed.2d at 389. The Court went on to state, "But when, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Nix v. Williams, supra*, 467 U.S. at 449, 104 S.Ct. at 2501.

In evaluating the actions of the police officers on March 10, 1991, this Court has emphasized the application of reasonableness in examining the totality of the circumstances. *Ohio v. Robinette*, ___ U.S. ___, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). In *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), the United States Supreme Court expressly disavowed any "litmus paper test" or single "sentence or paragraph rule," in recognition of the "endless variations in the facts and circumstances "implicating the Fourth Amendment." *Id.*, at 506, 103 S.Ct. at 1329. Where independent exigent circumstances justify a Fourth Amendment intrusion by police who are investigating grave crimes, evidence should not be deemed inadmissible even though similar circumstances would not justify warrantless intrusions for less serious offenses. *United States v. Aquino*, 836 F.2d 1268 (10th

Cir. 1988). The exigent circumstances justifying a warrantless search vary from case to case and the determination of the issue is of necessity fact-specific. *Osabutey v. Welch*, 857 F.2d 220 (4th Cir. 1988).

It is well-settled law that visual observations by a law enforcement officer situated in a place where he has a right to be is not a search within the meaning of the Fourth Amendment. *United States v. Coplen*, 541 F.2d 211, 214 (9th Cir. 1976), cert. denied, 429 U.S. 1073, 97 S.Ct. 810, 50 L.Ed.2d 791 (1977) What is visible through an open door is in plain view and not subject to Fourth Amendment protection. *United States v. Lloyd*, 36 F.3d 761 (8th Cir. 1994). Contrary to petitioner's contentions, the police did not aggravate the petitioner's Fourth Amendment rights by moving objects in plain view. In *United States v. Boettger*, 71 F.3d 1410 (8th Cir. 1995), the seizure of bomb-making materials and literature in a defendant's apartment during a search for destructive devices and explosive chemicals following an explosion in that same apartment, was permissible under the plain view doctrine, even though officials had to search through books, papers and other debris littering the apartment to find the questioned items.

In the present case, the Suppression Court found that all three prongs of the plain view exception were met in the present case. This opinion was affirmed by the Pennsylvania Superior Court and the Pennsylvania Supreme Court which referred to the exact language by the judge hearing the suppression motion. Even if the items seized were not observed by officers engaged in an investigation under exigent circumstances, the petitioner's own statement would have provided the police with an independent, untainted source of information from which a search warrant would have been obtained. Under such a fact pattern, suppression of the physical evidence would not serve any legitimate purpose.

B. The Suppression Court ruled correctly in denying the suppression motion where statements made by the defendant on March 10, 1991 occurred after defendant was provided with his *Miranda* rights on two occasions, and his waiver of rights was knowing, intelligent and voluntary.

Any determination regarding the voluntariness of a confession must be viewed under a totality of the circumstances test. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Federal courts have found in the past that intoxication and fatigue do not automatically render a confession involuntary. Instead, the test is whether those mental impairments caused a defendant's will to be overborne. *United States v. Casal*, 915 F.2d 1225 (8th Cir. 1990). A mere assertion that a statement may have been made while the speaker was under the influence of drugs is not sufficient to satisfy the burden of proving involuntariness, for voluntariness is not to be judged solely by reference to the speaker's state of mind, but to the exclusion of other relevant factors. *Wolrath v. LaVallee*, 576 F.2d 965 (2d Cir. 1978). Inculpatory statements made by a defendant at a hospital were not the product of an unconstitutional coercion, even though the defendant was relatively young and foreign-born with a poor command of the English language, was recovering from a serious knife wound and was in significant pain, where he was alert and awake, the investigators did not press the defendant to be interviewed, and the interrogations were relatively short. *Campaneria v. Reid*, 891 F.2d 1014 (2nd Cir. 1989).

An express written or oral statement or waiver by a defendant of his right to remain silent or of the right to legal assistance of counsel, though not conclusive, is "usually strong proof of validity of that waiver." *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286, 292 (1979). In *United States v. Hack*, 782 F.2d 862 (10th Cir. 1986), the pain experienced by the defendant from a gunshot wound to his

mouth inflicted during an attempted escape from federal authorities did not render his statements to the police involuntary, where a treating physician did not consider the wound serious and merely prescribed Novocain for it, and the defendant, who was mentally alert, had signed an express waiver of his *Miranda* rights. Compared to the facts of *Hack*, Reinert was in far superior command of his mental faculties at the time he provided statements to the police and medical personnel. Reinert was found to be alert, awake and oriented by the paramedic and the emergency room nurses who treated him. He received only mild anesthesia during surgery, and his surgeon found Reinert to be in a sufficiently stable condition to speak with the detectives six hours after his operation.

The petitioner claims the statements made by Reinert in the ambulance to the EMS technician Timothy Snyder were made while Reinert was in custody and were the result of questioning by police officers or a paramedic working at the behest of the police officers. These allegations ignore the fact the only restraints placed upon Reinert's liberty were those created by his own self-inflicted medical condition rather than any coercive action on the part of the police. There is no indication from the record that either paramedic Snyder or the two emergency room nurses asked any question of Reinert upon orders or request from the police officers. Instead, the record shows that Snyder specifically testified that he was not asked or requested by Officer Zimmerman or any other police officer to ask the patient any questions. (S.N.T. 8/20/91, 18) Reinert was asked questions by Sndyer that are typically posed to a patient in an emergency condition in order for the paramedics to determine what happened to cause the patient's injuries. (S.N.T. 8/20/91, 13) The emergency room nurse, Thomas Gavigan, testified he was not instructed by Officer Zimmerman to ask any questions, but did make inquiries of Reinert for purely medical purposes. (S.N.T. 8/20/91, 78) As a result, Reinert was not in custody when he was questioned by the paramedic or the emergency

room nurses, and therefore, was not entitled to any *Miranda* warning before speaking with those individuals.

The petitioner makes the untenable argument that when private citizens volunteer or are requested to assist the police, they become the agents of the government, and any of their actions must therefore be constricted by the *Miranda* warnings. This claim is completely without support in the record or under any decision by this Court. The Suppression Court judge concluded the statement made to Paramedic Snyder was not made while the defendant was in custody and statements made to Officer Zimmerman were only uttered after the defendant waived his *Miranda* rights. At the time of Reinert's first statement to Officer Zimmerman, the police did not even know if Reinert and Brady had been attacked by a third person. Judge McGinley also found the statements made to the emergency room nurses by Reinert occurred when the police were not present, nor were any questions asked by hospital personnel upon the request of police.

On two occasions, Reinert was *Mirandized* before police officers questioned him. Officer Zimmerman did not know the nature of a statement Reinert made to paramedic Snyder which prompted Snyder to suggest Zimmerman speak with the defendant. Reinert was within complete control of his mental faculties based upon an evaluation by Snyder and the emergency room nurses. The final statement Reinert provided to Detectives Stauffer and Granitz was also preceded by the administration of the *Miranda* warnings. Contrary to the exaggerated description provided by petitioner, the Suppression Court found, "The duration of the interrogation was relatively short, and the defendant volunteered incriminating statements early in the interrogation. The method of interrogation involved no coercion, threats or other similar techniques that would pressure the defendant and compromise his willingness to make a statement." (Suppression Ct. Opinion, Appendix, B-12)

The testimony from the Suppression Hearing indicated the defendant was in stable condition and that he had not been given sedatives or pain killers from the time of surgery until after the detectives left. (S.N.T. 8/21/91, 7-11) The defendant was able to provide accurate biographical information to the police officers, and gave cogent and logical answers in response to questions posed by the police. These included questions regarding the physical description of Det. Granitz, where Mr. Reinert was at the time, and his telephone number. (S.N.T. 8/20/91, 136-142) The defendant's waiver of his *Miranda* rights can be found in his explicit understanding of those rights, and his proffered explanation of how the victim was killed. (N.T. Vol. IV, 111-116) Judge McGinley took special note of the fact Det. Stauffer conferred with the defendant's doctor and inquired about his condition prior to the interview. The doctor, who had just done a post-operative check on the defendant, thought the defendant was capable of answering Det. Stauffer's questions. (Suppression Ct. Opinion, Appendix, B-12)

In an attempt to provide support for the belated attack upon the Suppression Court's reasoning, petitioner has included a number of affidavits as appendices to this Petition for Writ of Certiorari. These affidavits were never entered as matters of record in the lower court and the affiants have never been subjected to cross-examination based upon their opinions. The respondent/Commonwealth believes that this Court cannot consider allegations which are not a matter of record and which are presented to the Court merely as attachments to a pleading. *United States v. Madkins*, 994 F.2d 540 (8th Cir. 1993). In fact, the petitioner has included affidavits which were not originally filed with the appeal to the Pennsylvania Superior Court, but which were only submitted after the Superior Court denied the petitioner's post-trial motions to that Court. These affidavits were written by persons who did not have the opportunity to witness the defendant during the time period in which he was in the hospital or in the ambulance, who relied solely upon hypothetical evaluations from medical records, and who still

have not ever stated that they were available and willing to testify in these matters at the time of trial.

The petitioner claims the existence of testimony from the defendant's friends and family undermines the validity of the Suppression Court Opinion. The Suppression Court was provided the benefit of listening to testimony from all individuals about Reinert's condition at the time when the statement was made to the detectives, and the jury was able to consider relevant testimony from the same witnesses in evaluating the integrity of the statement the detectives received from Reinert. Although the detectives did not record the statement provided by Reinert, the failure to tape record or video tape a criminal defendant's confession does not, in itself, undermine the validity of the defendant's waiver of his *Miranda* rights, though such equipment was available to police officers. *United States v. Yunis*, F.2d 953 (D.C. Cir. 1988). Nothing about the hospital setting automatically renders the statement inadmissible. An inculpatory statement made by a defendant may be found to be voluntary notwithstanding that it was made in a hospital setting, provided the statement was not the result of any overbearing influence by the police. *Commonwealth v. McQuaid*, 273 Pa. Super. 600, 417 A.2d 1210 (1980), *United States v. Martin*, 781 F.2d 671 (9th Cir. 1985) and *United States v. Faul*, 748 F.2d 1204 (8th Cir. 1984).

The denial of the suppression motion was affirmed by the panel reviewing post-trial motions, by the Pennsylvania Superior Court, and by the Pennsylvania Supreme Court. There is not any basis in the record or under relevant case law to find the petitioner's statements were not provided intelligently, voluntarily and knowingly.

C. The defendant was not denied his Fifth and Sixth Amendment rights to effective assistance of trial counsel, due process and a fair trial.

When the issue of ineffective assistance of counsel was first raised in the Superior Court, petitioner failed to base his claim of ineffective assistance upon a violation of the Sixth Amendment of the United States Constitution. As a result, this claim for federal constitutional review is waived. See Respondent's Appendix A.

A defendant claiming ineffective assistance of counsel based on his attorney's performance must establish both that his attorney's performance was objectively unreasonable and that, but for the deficient performance, the result of the trial would probably have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). " The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

Petitioner initially claims that trial counsel was ineffective for failure to call an expert medical or psychiatric witness regarding the petitioner's physical and mental condition. The Pennsylvania Superior Court panel noted in its Opinion that trial counsel need not introduce expert testimony on his client's behalf if he is able to effectively cross-examine prosecution witnesses and elicit helpful testimony. *Commonwealth v. Williams*, 537 Pa. 1, 640 A.2d 1251 (1994). The Superior Court found that after reviewing the record, trial counsel thoroughly cross-examined all the Commonwealth's witnesses regarding Reinert's mental and physical state at the time he was given *Miranda* warnings and when he made statements to both police and medical staff. The Superior Court noted the Commonwealth produced overwhelming evidence that Reinert knowingly and

voluntarily waived his *Miranda* rights and held, "We conclude that trial counsel was not ineffective for failing to call medical experts at the Suppression Hearing." (Superior Court Opinion, Petitioner's Appendix, A-7)

In addition, where a defendant claims counsel was ineffective for failing to call an expert witness, the defendant must show that evidence was available and identify the witness who was willing to offer such testimony. *Commonwealth v. Holloway*, 524 Pa. 342, 572 A.2d 687 (1990); *United States v. Dean*, 55 F.3d 640 (D.C. Cir. 1995) Despite the introduction of a number of different affidavits from two doctors, the existence of certain opinions six years after the fact does not mean those doctors would have been willing and able to testify at either the Suppression Hearing or at the trial. Importantly, the affidavit from Dr. Sadoff misperceives the standard in question from whether the defendant knowingly, intelligently and voluntarily waived his rights to be whether the defendant "could effectively resist the interrogation of skilled police officers." (Dr. Robert Sadoff, Appendix, G-5) The opinions rendered by Dr. Sadoff and Dr. Bornfriend are based upon a cold review of records without benefit of being able to evaluate Reinert at the time that he provided the statements. Rather than relying upon post hoc evaluations of records, the Suppression Court and other appellate courts have found the testimony from the medical professionals who treated Reinert to be much more persuasive.

Petitioner also claims trial counsel was ineffective for not informing Reinert of his right to testify at the Suppression Hearing. In this particular case, Reinert's counsel called his mother, step-father, girlfriend and minister to testify to his physical condition during the Suppression Hearing. As a result, the Suppression Court had the benefit of hearing all possible evidence regarding the defendant's mental and physical state surrounding the time he gave statements to the police. Additionally, it would have been highly irregular to subject the defendant to cross-examination under oath at the Suppression

Hearing. Reinert took the stand during the trial and offered a lengthy explanation of his recollection of the entire incident leading up to and following the death of Sean Brady. By taking the stand at the Suppression Hearing, the defendant would have been potentially providing the Commonwealth with means to impeach his testimony at trial. Such a course of action would have been deemed to be highly suspect and subject to an allegation of ineffectiveness. Latter-day concessions of ineffectiveness by trial counsel or allegations of the same by the defendant do not mitigate the propriety of the actions taken during the time of trial. Such affidavits should be seen as nothing less than an after thought in an attempt to overturn the jury's verdict.

Petitioner's third allegation of ineffectiveness claims that trial counsel was ineffective for failing to testify at the Suppression Hearing or trial regarding trial counsel's observations of Reinert after he spoke to Detectives Stauffer and Granitz. As noted above, the Suppression Court had the benefit of listening to Reinert's mother, step-father, his girlfriend and his minister regarding their observations of Reinert at the time he provided a statement to the police. The defendant testified during his trial to strengthen the evidence from his own witnesses. The additional testimony from counsel would have been merely cumulative, and therefore cannot be seen as ineffective assistance.

The petitioner's last allegation of ineffectiveness focuses upon trial counsel's failure to obtain expert testimony regarding the effect of the drug Prozac upon the victim, Sean Brady. The Pennsylvania Supreme Court has written, "When a defendant claims that some sort of expert testimony should have been introduced at trial, the defendant must articulate what evidence was available and who was willing to offer such evidence." *Williams, supra,* 537 Pa. at 29, 640 A.2d at 1265. To this time, petitioner Reinert has failed to identify any witness who was qualified and willing to offer evidence concerning the

effects of Prozac at the time of trial. Although the affidavits supplied by the petitioner's doctors claim a plethora of experts were easily attainable to testify about the issues surrounding the use of Prozac, neither witness would state unequivocally that he or she was willing and available to testify in 1991 with a reasonable degree of medical certainty about the effects of Prozac. The inability to meet this threshold level would have precluded the testimony. *Commonwealth v. Edmiston*, 535 Pa. 210, 634 A.2d 1078 (1993).

The introduction of testimony regarding the use of Prozac was highly irrelevant because of its lack of connection to the self-defense argument offered by petitioner Reinert. It was never alleged that Reinert himself was using Prozac or that Prozac affected his mental state at the time of the murder. Instead, the Prozac was being used exclusively by the victim. All relevant testimony concerning the defendant's regard for the victim and his concern about the victim's alleged suicidal tendencies was admitted during the trial. (N.T. Vol. VII, 59) Testimony was also presented by the defendant from his mother, girlfriend, and two other friends surrounding the defendant's relationship with the victim and his long-running devotion to the victim's welfare. Any testimony about Prozac would have been injected solely for the purpose of smearing the victim in the minds of the jurors. Without any witness who can state that they would have presented testimony within a reasonable degree of medical certainty, trial counsel cannot be found to be ineffective for failure to call such a witness that did not exist.

D. The trial court ruled correctly in denying the introduction of lay testimony concerning the victim's use of Prozac.

This claim was also never based upon a federal constitutional violation, and should be deemed waived. See Respondent's Appendix B) The defendant was afforded all possible opportunities to argue self-defense and any lesser

degree of homicide to the jury. The prohibition upon the introduction of lay testimony regarding the victim's use of Prozac did not infringe upon the defendant's ability to present those defenses. Without established scientific testimony presented from credible witnesses regarding the use of Prozac, there was no basis for the introduction of the issue during the trial. This is only compounded by the fact that the defendant never claimed that he used Prozac or that it affected his mental faculties on the night of the homicide. Reinert attempted to claim he stabbed Brady six times in the chest in an attempt to prevent Brady from committing suicide. While lay testimony surrounding a defendant's actions, conversations and statements preceding a criminal event may be relevant for a jury, this is quite distinguishable from lay testimony regarding a dead victim's ingestion of a drug for which there was no authoritative scientific opinion.

Because of the absence of any foundation for the introduction of testimony regarding the use of Prozac, the Trial Court ruled correctly in excluding any reference to this drug. The defendant did not submit an offer of proof or any proposed testimony that the victim's use of Prozac created a reasonable or unreasonable belief in the need for self-defense on the night Reinert stabbed Brady. Even within the Petition for Writ of Certiorari, the petitioner has failed to explain how testimony surrounding the use of Prozac by the victim would have been used to rebut motive or to support an allegation of the belief in the need for self-defense, however reasonable or unreasonable. To have permitted the jury to consider testimony regarding the use of a controversial drug, even if unnamed, would have subjected the jury to a collateral issue in this case without the basis of any factual observations or expert testimony. Therefore, the Trial Court ruled correctly in prohibiting the introduction of any lay testimony regarding the victim's use of Prozac.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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